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Veterans' Benefits: The Department of Veterans Affairs and the Duty to Assist Claimants

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Summary

The Department of Veterans Affairs (VA) provides an array of benefits to veterans and to certain members of their families. These benefits include disability compensation and pensions, education benefits, survivor benefits, medical treatment, life insurance, vocational rehabilitation, and burial and memorial benefits. In order to apply for these benefits, in most circumstances, the claimant will send an application to his or her local VA Regional Office or apply online. Once a veteran has filed an application for benefits with the VA, the agency has a unique obligation to the claimant when adjudicating the claim—the VA has a “duty to assist” the claimant throughout the claim process.

This duty to assist imposes numerous requirements on the VA during the claim process. The VA must assist claimants in obtaining the forms and information necessary to apply for a benefit; inform claimants of any information missing from an application; explain what evidence must be obtained in order to substantiate a claim for benefits; assist the claimant in obtaining records and evidence from both private and federal entities; and provide certain claimants with a medical examination or opinion when certain conditions are met. As illustrated in this report, certain aspects of the VA’s duty to assist can add to the claims processing time.

In addition to assistance the VA must provide during the development of a claim, the VA also is required to implement other pro-claimant standards when adjudicating a claim. For example, the VA must consider legal theories that a claimant may not have argued in his application for benefits and must grant those benefits if they are supported by law. Furthermore, the VA must adjudicate a claim for benefits under a pro-claimant standard of proof—the VA may only deny a claim if the preponderance of the evidence weighs against the claimant.

This report analyzes court decisions that have examined the VA’s obligation to assist veterans during the claims process.

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Introduction

The Department of Veterans Affairs (VA) provides an array of benefits to veterans and to certain members of their families. These benefits include disability compensation and pensions, education benefits, survivor benefits, medical treatment, life insurance, vocational rehabilitation, and burial and memorial benefits.¹ In order to apply for these benefits, in most circumstances, the claimant will send an application to his or her local VA Regional Office or apply online.² Once a veteran has filed an application for benefits with the VA, the agency has a unique obligation to the claimant when adjudicating the claim—the VA has a “duty to assist” the claimant throughout the claim process.³ This duty to assist includes obligations to ensure that a claimant’s file is complete, to seek evidence and records substantiating the claim, and to provide medical examinations under certain circumstances.⁴ Furthermore, the VA, when adjudicating any claim for benefits, is obligated to give the claimant the “benefit of the doubt” when there is “an approximate balance of positive and negative evidence regarding” any claim,⁵ and must also consider legal theories that a claimant fails to raise if it would help substantiate a claim for benefits.⁶

This duty to assist and the benefit of the doubt standard are unique among the federal government’s benefits programs. For example, the United States Department of Agriculture is under no similar obligation to assist applicants in obtaining evidence of eligibility for Supplemental Nutrition Assistance Program (SNAP) benefits;⁷ the Social Security Administration does not give “the benefit of the doubt” to applicants for Social Security benefits.⁸ These requirements have the effect of making the VA claims adjudication system “strongly and uniquely pro-claimant.”⁹ Because the backlog of claims at the VA is a substantial concern for Congress and the agency, it is worth noting that although the VA’s duty to assist provides significant help for veterans filing claims, it also increases the amount of time required to adjudicate claims for benefits fully. This report will analyze the VA’s duty to assist claimants and the pro-claimant standard of proof used during the adjudicatory process for veterans’ benefits.

¹ The Veterans Administration website provides comprehensive information on the benefits available to veterans. See Department of Veterans Affairs, Benefits and Services Available, <http://www.va.gov/opa/newtova.asp>.

² To apply for benefits online, claimants should visit the VA’s ebenefits website: https://www.ebenefits.va.gov/ebenefits-portal/ebenefits.portal?_nfpb=true&_nfxr=false&_pageLabel=Apply.

³ See 38 U.S.C. §§ 5102, 5103, 5103A.

⁴ See *id.*

⁵ 38 U.S.C. § 5107.

⁶ 38 C.F.R. § 3.103(a).

⁷ See 7 U.S.C. §§ 2011 *et seq.*

⁸ See 20 C.F.R. § 404.902 (For federal old-age, survivors and disability insurance “[w]e base our initial determination on the preponderance of the evidence.”); 20 C.F.R. § 416.1402 (For supplemental security income for the aged, blind, and disabled “[w]e base our initial determination on the preponderance of the evidence.”).

⁹ *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998).

Duty to Assist During the Initial Completion of an Application for Benefits

VA Must Provide All Forms Free of Charge

A veteran must submit an application either through the VA's online application system or by submitting a paper application to the local VA Regional Office. Even at this early stage of the process, the VA is required to provide assistance to claimants for benefits.¹⁰ The VA must provide to any person expressing an intent to apply for benefits all "instructions and forms necessary to apply for that benefit."¹¹ The VA must provide those forms and instructions to such person free of charge.¹²

VA Must Inform Claimants if Application is Incomplete

When a claimant submits an initial application for benefits, the VA is obligated by 38 U.S.C. § 5102(b) to inform the claimant if his or her application is incomplete and must inform the claimant of the precise information that is needed in order to complete the claim.¹³ However, if the claimant (or the claimant's representative) fails to furnish the necessary information within one year after the VA has provided notice, then "no benefit may be paid or furnished by reason of the claimant's application."¹⁴ After that deadline has passed, the claimant would have to open a new claim.

Notably, the requirement in Section 5102(b) that the VA provide notice to a claimant of any "information necessary to complete [an] application" does not impose a duty to inform the claimant of the evidence necessary to substantiate the claim.¹⁵ The Court of Appeals for Veterans Claims (CAVC) has noted that, at least for the VA's obligations under Section 5102(b), "information" includes things such as an applicant's Social Security number, address, name, medical conditions upon which the claim is based, and sufficient service information for the VA to verify that the claimant actually served in the United States Armed Forces.¹⁶ Such information is necessary in order to *complete* an application, as distinguished from evidence necessary to *substantiate* a claim.¹⁷ The CAVC noted that a different section of the *United States Code*, 38 U.S.C. § 5103(a), does require the VA to inform claimants of evidence necessary to substantiate a claim, however, that obligation only arises after the VA has received a "complete or substantially complete" application.¹⁸

¹⁰ See 38 U.S.C. § 5102(a); 38 C.F.R. § 3.150(a).

¹¹ See 38 U.S.C. § 5102(a); 38 C.F.R. § 3.150(a).

¹² 38 U.S.C. § 5102(a).

¹³ 38 U.S.C. § 5102(b).

¹⁴ 38 U.S.C. § 5102(c).

¹⁵ *Davis v. Shinseki*, 22 Vet. App. 352 (2009).

¹⁶ *Id.* at 356.

¹⁷ *Id.*

¹⁸ *Id.*

Duty to Assist During the Development of a Claim

Duty to Inform Claimant of Evidence Necessary to Substantiate Claim

After the VA receives a complete or a substantially complete application for benefits,¹⁹ the VA is required to assist in the development of the claim. The Veterans Claims Assistance Act of 2000 (VCAA)²⁰ requires the VA to notify the claimant of any information or medical or lay evidence that is needed to substantiate the claim.²¹ The VA is also obligated to inform the claimant about which information the VA will try to obtain on the claimant's behalf and which information or evidence the claimant will be required to obtain for himself.²² One court noted that the duty to notify "was designed by Congress with one purpose in mind—to facilitate and maximize the collaborative process that is the cornerstone of the VA claims process."²³ However, similar to the requirement established by 38 U.S.C. § 5102, if the claimant does not respond to the VA's notice within one year, then "no benefit may be paid or furnished by reason of the claimant's application."²⁴

The United States Court of Appeals for the Federal Circuit (Federal Circuit) has noted that 38 U.S.C. § 5103 requires the VA to "provide affirmative notification to the claimant prior to the initial decision in the case as to the evidence that is needed and who shall be responsible for providing it."²⁵ The Federal Circuit, therefore, firmly established that the notice must be provided *prior* to the initial decision—explanations for why the VA rejected the claimant's application, such as a Statement of the Case provided after an appeal has been filed, do not satisfy the notice requirements under Section 5103.²⁶

Courts also require more than a general statement of what is required by law to substantiate the claim of benefits; instead, the notice must be, to some extent, tailored to the particular type of claim at issue. To this point, the CAVC, in *Locklear v. Nicholson*, stated:

It is of the utmost importance to realize that the duty to notify is geared entirely toward 'information and evidence' as opposed to legal requirements or some other formulaic abstraction. Thus, a letter in which VA merely sets forth the legal requirements for obtaining

¹⁹ A "substantially complete" application includes "the claimant's name; his or her relationship to the veteran, if applicable; sufficient service information for VA to verify the claimed service, if applicable; the benefit claimed and any medical condition(s) on which it is based; the claimant's signature; and in claims for nonservice-connected disability or death pension and parents' dependency and indemnity compensation, a statement of income." 38 C.F.R. § 3.159(a)(3).

²⁰ P.L. 106-475, 114 Stat. 2096 (2000).

²¹ 38 U.S.C. § 5103(a); 38 C.F.R. § 3.159(b).

²² 38 U.S.C. § 5103(a); 38 C.F.R. § 3.159(b); *see also infra* section on VA's obligation to obtain certain records on behalf of the claimant.

²³ *Locklear v. Nicholson*, 20 Vet. App. 410, 414 (2006).

²⁴ 38 U.S.C. § 5103(b).

²⁵ *Mayfield v. Nicholson*, 444 F.3d 1328, 1333 (Fed. Cir. 2006).

²⁶ *Id.*

an award of service connection would be insufficient to satisfy the clear terms of section 5103(a).²⁷

In *Locklear*, the claimant challenged the notice that the VA provided as insufficient under 38 U.S.C. § 5103.²⁸ The claimant argued that the duty to notify required the VA to evaluate all the evidence already in the agency's possession and to determine whether the claim fell short before reaching a decision on the merits.²⁹ If the VA believed the evidence was insufficient, the claimant argued that the VA was required to explain to the claimant what further evidence, if provided, would entitle him to the benefits sought.³⁰ In that case, the VA provided notice to the claimant that stated (1) what the legal requirements were for qualifying for the particular benefit; (2) examples of types of evidence and information that can be used to substantiate that type of claim; (3) what evidence was already in the VA's possession; (4) which evidence the VA would try to obtain; and (5) which evidence the claimant should obtain.³¹ The CAVC determined that this was sufficient notice provided to the claimant.³² The court noted that although a simple restatement of the legal requirements likely would not be sufficient, the VA is not required to "pre-adjudicate" the claim based on current evidence and determine whether new evidence would be required to substantiate the claim.³³ The CAVC stated:

[T]he duty to notify deals with evidence gathering, not the analysis of already gathered evidence... it would be senseless to construe the statute as imposing upon the Secretary a legal obligation to rule on the probative value of information and evidence presented in connection with a claim prior to rendering a decision on the merits of the claim itself.³⁴

Importantly, the notice requirement established by 38 U.S.C. § 5103 only applies at the outset of a claim. The VA's obligation to provide notice on the evidence necessary to substantiate a claim does not continue after the initial adjudication of an application; therefore, if the Board of Veterans' Appeals (BVA) remands a claim on appeal to the VA Regional Office for further development of a claim, the VA does not need to provide additional notice to the claimant on the evidence necessary to substantiate the claim.³⁵

Duty to Assist Claimants in Obtaining Records to Substantiate a Claim

Unique Obligation to Assist Claimants Can Be Time Consuming

The VA is required to "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the

²⁷ *Locklear*, 20 Vet. App. at 414.

²⁸ *Id.* at 412.

²⁹ *Id.* at 415.

³⁰ *Id.*

³¹ *Id.* at 414-15.

³² *Id.* at 415-16.

³³ *Id.* at 415.

³⁴ *Id.* at 415-16.

³⁵ *Dunlap v. Nicholson*, 21 Vet. App. 112, 116-17 (2007).

Secretary [of Veterans Affairs].”³⁶ This requirement is arguably the most substantial form of assistance that the VA is required to provide to claimants.

Perhaps not surprisingly, the VA’s efforts to obtain records and evidence on behalf of claimants take a substantial amount of time. According to a December 2012 Government Accountability Office (GAO) report, “[t]he evidence gathering phase is the most time-intensive phase, taking over 5 months (157 days) on average in fiscal year 2011 and continuing to grow throughout fiscal year 2012.”³⁷ Any claim that takes over 125 days is considered to be in the VA claims “back log”—therefore, on average, the amount of time it takes to gather evidence is longer than the VA’s goal for complete adjudication of a claim.³⁸

To illustrate the length of time required to acquire evidence for a claimant, it is helpful to compare a typical claim with a Fully Developed Claim (FDC).³⁹ A claimant is permitted to submit an FDC, which is a completed claim requiring little, if any, evidence gathering by the VA on the claimant’s behalf.⁴⁰ These FDC claims take the VA approximately 117 days, on average, to complete.⁴¹ However, the average claim, which includes claims that require the VA to gather evidence on behalf of claimants, takes approximately 260 days to complete.⁴² In 2013, the VA noted that one of its top priorities is to encourage claimants to use the FDC claim process.⁴³ According to the VA, in FY2013, only 3% of claims were received in FDC form.⁴⁴

This section of the report will discuss the various obligations that the VA has to obtain evidence on behalf of claimants.

Threshold Requirements to Trigger VA Obligation to Obtain Records

The VA must assist all claimants in gathering evidence to help substantiate their claims unless the claim is clearly frivolous. Pursuant to VA regulations, the VA will only refrain from gathering evidence “if the evidence obtained indicates that there is no reasonable possibility that further assistance would substantiate a claim.”⁴⁵ The VA has stated that it will not gather evidence for claimants in certain situations, including when:

³⁶ 38 U.S.C. § 5103A(a)(1); 38 C.F.R. § 3.159(c)(1).

³⁷ Government Accountability Office, *Veterans’ Disability Benefits: Timely Processing Remains a Daunting Challenge* 7-8, GAO-13-89 (Dec. 2012) *available at* <http://www.gao.gov/assets/660/651066.pdf>.

³⁸ *See id.* at 9.

³⁹ *See* VA Manual, M21-1MR Part 3, Ch. 3, *available at* http://www.benefits.va.gov/WARMS/M21_1MR3.asp#a.

⁴⁰ “A fully developed claim is one that includes all DoD service medical and personnel records, including entrance and exit exams, applicable [Data Based Questionnaires], any private medical records, and a fully completed claim form.” Veterans Benefits Administration, *VA Strategic Plan to Eliminate the Compensation Claims Backlog* 8 (Jan. 25, 2013), *available at* http://www.benefits.va.gov/transformation/docs/VA_Strategic_Plan_to_Eliminate_the_Compensation_Claims_Backlog.pdf.

⁴¹ *Id.*

⁴² Government Accountability Office, *Veterans’ Disability Benefits: Timely Processing Remains a Daunting Challenge* 7-8, GAO-13-89 (Dec. 2012).

⁴³ Veterans Benefits Administration, *VA Strategic Plan to Eliminate the Compensation Claims Backlog* 8 (Jan. 25, 2013).

⁴⁴ *Id.*

⁴⁵ 38 C.F.R. § 3.159(d).

- (1) The [claimant is ineligible] for the benefit sought because of lack of qualifying service, lack of veteran status, or other lack of legal eligibility;
- (2) Claims [] are inherently incredible or clearly lack merit; and
- (3) An application request[s] a benefit to which the claimant is not entitled as a matter of law.⁴⁶

The Federal Circuit has also noted that the VA is only required to assist a claimant in obtaining *relevant* medical records.⁴⁷ In one case, a claimant sought compensation for PTSD and argued that the VA failed to satisfy its duty to obtain medical records from the Social Security Administration (SSA) on behalf of the claimant.⁴⁸ However, those medical records concerned a back injury the claimant had sustained and did not discuss the mental health of the claimant.⁴⁹ The Federal Circuit noted that the VA did not fail to satisfy the duty to assist by failing to obtain these records, stating:

There can be no doubt that Congress intended VA to assist veterans in obtaining records for compensation claims, but it is equally clear that Congress only obligated the VA to obtain ‘relevant’ records...The language of the statute is explicit: not all medical records or all SSA disability records must be sought – only those that are relevant to the veteran’s claim.⁵⁰

Finally, pursuant to statute, the VA “may defer providing assistance” in obtaining records “pending the submission by the claimant of essential information missing from the claimant’s application.”⁵¹ Therefore, a claimant’s application must be substantially complete before the obligation to assist in obtaining records is triggered.

Assistance in Obtaining Records

The VA is required to make “reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant’s claim for a benefit under a law administered by the Secretary.”⁵² The VA is required to attempt to obtain records from private parties and from other federal agencies.⁵³ Federal regulations outline the procedures for obtaining records not in the custody of a federal department or agency⁵⁴ and for obtaining records that are in the custody of a federal department or agency.⁵⁵

For non-federal records, the VA’s regulations state that the agency will seek “records from State or local governments, private medical care providers, current or former employers, and other non-

⁴⁶ *Id.*

⁴⁷ See 38 U.S.C. § 5103A (“the Secretary shall make reasonable efforts to obtain relevant private records”).

⁴⁸ *Golz v. Shinseki*, 590 F.3d 1317 (Fed. Cir. 2010).

⁴⁹ *Id.* at 1319.

⁵⁰ *Id.* at 1321.

⁵¹ 38 U.S.C. § 5103A(a)(3).

⁵² 38 U.S.C. § 5103A(a)(1).

⁵³ 38 U.S.C. § 5103A(b), (c); 38 C.F.R. § 3.160(c).

⁵⁴ 38 C.F.R. § 3.159A(c)(1).

⁵⁵ 38 C.F.R. § 3.159A(c)(2).

federal governmental sources.”⁵⁶ The claimant is required to cooperate with the VA by providing sufficient information that will permit the VA to locate the records, and the claimant must sign a release, if necessary, to allow the VA to obtain such records.⁵⁷ The VA generally will make an initial request for the relevant records and “at least one follow-up request.”⁵⁸ However, pursuant to VA regulations, the VA is not required to make a follow-up request “if a response to the initial request indicates that the records sought do not exist or that a follow-up request for the records would be futile.”⁵⁹

For records in the custody of another federal agency, the requirement to obtain the record is slightly different. Instead of simply providing one follow-up request, the VA’s “efforts to obtain those records shall continue until the records are obtained unless it is reasonably certain that such records do not exist or that further efforts to obtain those records would be futile.”⁶⁰

It is important to note that, in 1973, a fire at the National Personnel Records Center destroyed approximately 16-18 million Official Military Personnel Files.⁶¹ Therefore, for many veterans, important records were destroyed and are no longer available. The CAVC has ruled that when a claimant’s federal records have been lost or destroyed, the VA has a heightened duty to assist the claimant.⁶² In *Washington v. Nicholson*, the CAVC held that the VA, when the claimant’s service medical records were unavailable, had not complied with the heightened duty to assist because it failed to seek other records that may have been available to corroborate the claimant’s injury.⁶³ Furthermore, the court noted that the VA failed to advise the claimant “adequately as to the alternative forms of information and evidence that he could use to establish his claim,” such as using “buddy statements”⁶⁴ to help prove the existence of an injury.⁶⁵

If, after making reasonable efforts, the VA is unable to locate any records sought, the VA will notify the claimant that it is unable to obtain the records.⁶⁶ The notification must identify the records being sought, explain the efforts made to obtain the records, and describe any further action to be taken by the VA regarding the claim.⁶⁷

Importantly, the claimant must also cooperate with the VA during the development of the claim. The CAVC has noted that “[c]orresponding to VA’s duty to assist the veteran in obtaining information is a duty on the part of the veteran to cooperate with VA in developing a claim. VA’s duty must be understood as a duty to assist the veteran in developing a claim, rather than a duty

⁵⁶ 38 C.F.R. § 3.159(c)(1).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ 38 U.S.C. § 5103A(c)(2).

⁶¹ See National Archives, The 1973 Fire, National Personnel Records Center (last accessed June 30, 2014), *available at* <http://www.archives.gov/st-louis/military-personnel/fire-1973.html>.

⁶² *Cueva v. Principi*, 3 Vet. App. 542, 548 (1992) (“[T]he Board has the duty to assist the veteran in developing facts pertinent to his claim...This duty is heightened in a case such as this where service medical records are presumed destroyed and includes the obligation to search for alternate medical records.”).

⁶³ *Washington v. Nicholson*, 19 Vet. App. 362, 370 (2005).

⁶⁴ A “buddy statement” is a statement from a fellow servicemember that served with the claimant.

⁶⁵ *Washington*, 19 Vet. App. at 370-71.

⁶⁶ 38 U.S.C. § 5103A(b)(2); 38 C.F.R. § 3.160(e).

⁶⁷ 38 U.S.C. § 5103A(b)(2); 38 C.F.R. § 3.160(e).

on the part of VA to develop the entire claim with the veteran performing a passive role.”⁶⁸ Claimants are responsible for showing up to medical examinations provided by the VA and should respond to VA requests for information that may help the VA determine where locatable records and evidence may be obtained.⁶⁹

Duty to Provide Medical Examinations for Compensation Claims

If the case involves a claim for disability compensation, the VA is required to provide the claimant with a medical examination or obtain a medical opinion when such an examination or opinion is necessary to make a decision on the claim.⁷⁰ The VA is required to provide an examination or opinion if the evidence on the record (1) contains competent evidence that the claimant has a current disability or persistent or recurrent symptoms of disability⁷¹ and (2) indicates that the disability or symptoms *may* be associated with the claimant’s active military, naval, or air service.⁷² However, if the record already contains sufficient medical evidence for the VA to make a decision on the claim, then the agency is not required to provide a medical examination or opinion.⁷³

Courts have determined that the threshold requirements for having the right to a medical examination are easy to meet. In order to deny a claimant a medical examination, the VA must conclude on the basis of the record before it that “no reasonable possibility exist[s] that an examination would aid in substantiating... a claim.”⁷⁴

The CAVC described the requirements as follows:

[The VA must provide an examination or medical opinion when] there is (1) competent evidence of a current disability or persistent or recurrent symptoms of a disability, and (2) evidence establishing that an event, injury, or disease occurred in service ... and (3) an indication that the disability or persistent or recurrent symptoms of a disability may be associated with the veteran’s service or with another service-connected disability, but (4) insufficient competent medical evidence on file for the Secretary to make a decision on the claim.⁷⁵

The first requirement is met when there is *competent* evidence that the claimant is *currently* suffering from a disability or recurrent symptoms of a disability.⁷⁶ A claimant may provide statements from doctors or family members to show that he is currently suffering some form of disability. Second, the claimant must show that he suffered an in-service injury, event, or

⁶⁸ Turk v. Peake, 21 Vet. App. 565, 568 (2008).

⁶⁹ *Id.*; see also Wood v. Derwinski, 1 Vet. App. 190, 193 (1991) (“The duty to assist is not always a one-way street. If a veteran wishes help, he cannot passively wait for it in those circumstances where he may or should have information that is essential in obtaining the putative evidence.”).

⁷⁰ 38 U.S.C. § 5103A(c)(4); 38 C.F.R. § 3.159(c)(4).

⁷¹ 38 U.S.C. § 5103A(d)(2)(A).

⁷² 38 U.S.C. § 5103A(d)(2)(B).

⁷³ 38 U.S.C. § 5103A(d)(2)(C).

⁷⁴ Duenas v. Principi, 18 Vet. App. 512, 518 (2004).

⁷⁵ McLendon v. Nicholson, 20 Vet. App. 79, 81 (2006).

⁷⁶ *Id.* at 81-82.

disease.⁷⁷ Service records may be able to show that the event occurred, or the claimant may rely on “buddy statements” to show that an injury or event occurred while in-service.

Third, there must merely be an “indication” that the disability “*may* be associated with the claimant’s *service*.”⁷⁸ Importantly, it does not have to be *conclusive* that the symptoms or injury were caused by the claimant’s service—as the CAVC noted “In contrast to the second element, which requires evidence to establish an in-service injury, this element requires only that the evidence ‘indicates’ that there ‘may’ be a nexus between the two. This is a low threshold.”⁷⁹ Showing that an injury may have been related to a claimant’s service does not necessarily require a medical opinion—the CAVC has held that a claimant is capable of providing lay testimony sufficient to “indicate” that his own disability could be associated with his service.⁸⁰ Importantly, just because a medical opinion does not provide a sufficient nexus to a claimant’s service to substantiate a claim for benefits does not mean that the medical opinion did not meet the requirements for the VA to provide a medical examination to the claimant.⁸¹ This test is to determine whether the VA is to provide a medical opinion, not whether the claimant has established a successful claim for benefits.⁸²

The fourth part of the test to determine if the VA must provide a claimant with a medical examination or opinion is whether there is already sufficient medical evidence in the claimant’s file to make a final determination on the claim.⁸³ Importantly, courts have held that the VA must show that “no reasonable possibility exist[s] that an examination would aid in substantiating” a claim.⁸⁴ Therefore, the medical evidence on file must clearly establish that there is no nexus between the injury claimed and the claimant’s service. The CAVC has noted that just because a medical opinion already in the record does not substantiate a claim, it does not mean that it affirmatively proves the claim to be invalid: “the absence of actual evidence is not substantive ‘negative evidence.’”⁸⁵ In other words, there must be clear evidence that the claim is invalid to deny a claimant a VA medical examination or medical opinion, not merely insufficient evidence to support a claim fully. Also, the BVA is not permitted to “rely on its own unsubstantiated medical conclusions to reject medical evidence in the record; rather, the [BVA] may reject a claimant’s medical evidence only on the basis of other independent medical evidence.”⁸⁶

In short, if there is an indication that an in-service event may have caused a current disability, the VA must provide a medical examination or opinion to the claimant to establish whether a nexus

⁷⁷ *Id.* at 82-83.

⁷⁸ *Id.* at 83.

⁷⁹ *Id.*

⁸⁰ *Charles v. Principi*, 16 Vet. App. 370, 374-75 (2002). Notably, the VA may, in some circumstances, find that the statements of a veteran are not credible and, therefore, could not be used to show that there is a nexus between the injury and the in-service event. *See Coburn v. Nicholson*, 19 Vet. App. 427, 432 (2006).

⁸¹ *McLendon*, 20 Vet. App. at 84 (noting that the Board erred by proceeding “to weigh the evidence and determine that the [medical] opinions were speculative and could not establish a medical nexus” to reject the claim instead of properly awarding a VA medical examination because those opinions, though insufficient to grant an entitlement to benefits, indicated that there “may be an association between an in-service injury and a current disability”).

⁸² *See id.*

⁸³ *Id.* at 84-85.

⁸⁴ *Duenas*, 18 Vet. App. at 518.

⁸⁵ *See McLendon*, 20 Vet. App. at 85.

⁸⁶ *Flash v. Brown*, 8 Vet. App. 332, 339 (1995).

exists between the disability and the claimant's service, unless the medical records on file show that there is no reasonable possibility that an examination will help substantiate a claim.

Duty to Consider All Legal Theories that Could Support a Claim

The VA is required to assist veterans by considering all possible legal theories that would support a claim, even if the veteran does not raise the particular issue in his application for benefits. VA regulations require the VA to assist the claimant “in developing the facts pertinent to the claim and to render a decision that grants every benefit that can be supported in law while protecting the interests of the government.”⁸⁷ This requirement, again, is a unique feature of the VA benefits system and illustrates the non-adversarial nature of benefits proceedings. However, although courts have enforced the regulation to require the VA to take into consideration legal theories not raised by a claimant that could be used to substantiate a claim,⁸⁸ the courts do not require the VA to consider every possible argument that a claimant presumably could make.⁸⁹ Instead, the VA is only obligated to consider legal theories that the claimant failed to argue if the record of evidence “fairly raise[s]” those issues.⁹⁰ The VA must consider those arguments even if the claimant is unaware of the potential claim.⁹¹ The CAVC has stated:

[W]e conclude that the Board is not required *sua sponte* to raise and reject all possible theories of entitlement in order to render a valid opinion. The Board commits error only in failing to discuss a theory of entitlement that was raised either by the appellant or by the evidence of record. This standard is generous to veterans but respects the reality that the Secretary does not have the resources to investigate *sua sponte* every conceivable unsupported theory of entitlement.⁹²

A Unique Pro-Claimant “Benefit of the Doubt” Standard of Proof for VA Benefit Claims

Another unique aspect of the VA benefits system is that the standard of proof is pro-claimant. The claimant need not show by a preponderance of the evidence that he is entitled to benefits—instead, the law provides that “[w]hen there is an approximate balance of positive and negative evidence regarding any issue material to the determination, the VA shall give the benefit of the doubt to the claimant.”⁹³ Regulations provide that when reasonable doubt arises, such doubt will

⁸⁷ 38 C.F.R. § 3.103(a).

⁸⁸ *See* *Schroeder v. West*, 212 F.3d 1265, 1271 (Fed. Cir. 2000) (“[T]he agency’s duty to assist...attaches to the investigation of *all* possible in-service causes of that current disability, including those unknown to the veteran.”).

⁸⁹ *Robinson v. Mansfield*, 21 Vet. App. 545 (2007).

⁹⁰ *Id.* at 553.

⁹¹ *Id.*

⁹² *Id.*

⁹³ 38 C.F.R. § 3.102.

be resolved in favor of the claimant.⁹⁴ Therefore, if a claimant provides medical evidence that shows that it is as likely as not that there is a connection between an in-service injury and the claimant's current disability, the VA shall award the claimant the benefits sought. Thus, the VA can deny the claim only if the preponderance of the evidence is against the claimant. The CAVC eloquently described the standard of proof in *Donnellan v. Shinseki*:

The standard of proof refers to the evidentiary threshold a litigant must satisfy in order to prevail on his claim. [T]his court [has] recognized that a unique standard of proof – the “benefit of the doubt” – applies in decisions involving claims for veteran’s benefits. The “benefit of the doubt” standard, which is at the farthest end of the spectrum of the various standards of proof in American legal jurisprudence, was enacted by Congress in keeping with the high esteem in which our nation holds those who have served in the Armed Services. The “benefit of the doubt” standard applies when the positive and negative evidence regarding the merits of a veteran’s claim for benefits are in approximate balance. When such equipoise exists, the veteran must prevail on the merits of his claim. Therefore, a veteran need only demonstrate that there is an approximate balance of evidence in order to prevail on his claim. A claim for veterans benefits may only be denied when the preponderance of evidence is against a claim.⁹⁵

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⁹⁴ *Id.*

⁹⁵ *Donnellan v. Shinseki*, 24 Vet. App. 167, 175 (2010).